

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TAMERA GOBIN,

Plaintiff,

v.

DEPARTMENT OF THE ARMY
WESTERN REGIONAL COMMAND
MADIGAN ARMY MEDICAL CENTER,

Defendant.

Case No. C07-5677-RBL

ORDER DENYING FEDERAL
DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant Department of the Army's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). [Dkt. # 6]. Plaintiff asserts a Federal Tort Claims Act claim against Defendant under 28 U.S.C. §§ 2671-2680,¹ for failure to properly diagnose an extremely rare metabolic disorder known as Trimethylaminuria (TMAU), or Fish Malodor Syndrome. [Dkt. # 1]. According to Plaintiff, the Defendant's failure to test for TMAU caused her to delay seeking proper treatment for the condition,² "psycho-social damage," and lost wages. [*Id.*]. RCW 7.70.150(1) requires one claiming medical malpractice to file a certificate of merit.³ Defendant argues Plaintiff's claim must be dismissed

¹ Plaintiff's Complaint never cites to the FTCA specifically, but as the Defendant concedes, a pro se Plaintiff's complaint must be construed liberally. Defendant points out and the Court agrees, Plaintiff has asserted, if anything, an FTCA claim. [Dkt. # 6].

² Apparently there is no cure for the disease, but there are treatment options available that would help mitigate the symptoms of the condition. [Dkt. # 2, Ex. 1].

³ RCW 7.70.150(1) provides in part that in an "[a]ction against an individual health care provider under this chapter for personal injury ... in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing

1 because she did not comply with this requirement. [Dkt. # 6]. For the following reasons, Defendant's
2 motion is DENIED.

3 Plaintiff has appeared pro se. Courts in this Circuit have long held that, particularly where a pro se
4 petitioner is facing dismissal, the court will construe his or her pleadings liberally. *See Balistreri v. Pacifica*
5 *Police Dept.* 901 F.2d 696, 699 (9th Cir. 1990); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)
6 (“[W]e have an obligation where the petitioner is pro se ... to construe the pleadings liberally and to afford
7 the petitioner the benefit of any doubt.”)

8 When dealing with an FTCA action, the federal court must look to the law of the place where the
9 acts of negligence occurred. *Washington v. U.S.*, 769 F.2d 1436, 1437 (9th Cir. 1985). It is long settled,
10 however, that the statute of limitation in the FTCA, 28 U.S.C. § 2401, governs in FTCA actions, even
11 when the state period of limitations is longer or shorter. *Poindexter v. United States*, 647 F.2d 34, 36 (9th
12 Cir. 1981) (citations omitted). An FTCA claim must be filed with the appropriate federal agency within
13 two years after the claim accrues. 28 U.S.C. §§ 2401(b) and 2675(a). If the administrative claim is denied,
14 the claimant has six months “after the date of mailing” to file an action in district court. §2401(b);
15 *Poindexter*, 647 F.2d at 36. If either requirement is not met, the suit will be time barred. §2401(b); *see*
16 *Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984). At least for the purposes of this motion,
17 Plaintiff met both requirements. Defendant mailed Plaintiff a final agency determination denying her claim
18 on June 6, 2007. [Dkt. # 2, Ex. 1]. On December 6, 2007, exactly six months later, Plaintiff timely filed
19 her Complaint with this Court pursuant 28 U.S.C. §§ 2671-2680. [Dkt. # 1].

20 However, Plaintiff failed to file a certificate of merit at the commencement of this action as required
21 under RCW 7.70.150(1). But where, as here, “the action is commenced within forty-five days prior to the
22 expiration of the applicable statute of limitations,” the statute permits plaintiff an additional 45 days from
23 the date of filing to file a certificate of merit. *See* RCW 7.70.150(1); *Abear v. Teveliet*, 2006 WL 3813560
24 at *1 (W.D.WA Dec. 21, 2006) (“The obvious purpose of this provision is to permit one in danger of
25 having her claims expire to promptly file the complaint and then, within 45 days, to supplement her filing
26 with the required certificate of merit.”).

27 Because Plaintiff filed her Complaint within 45 days of the expiration of the statute of limitations,
28 _____
the action.”

1 she was automatically entitled to 45 days to supplement her Complaint with a certificate of merit. In other
2 words, she was required to file a certificate of merit by January 22, 2008.⁴ Plaintiff did not do so.
3 However, upon Plaintiff's motion and a showing of "good cause," a court "may grant" an extension of no
4 more than 90 days to file a certificate of merit. *See* RCW 7.70.150(4) (emphasis added). The 90-day
5 extension would commence on the date the automatic 45-day extension expired. Therefore, if Plaintiff
6 sought and received an extension she would have until April 21, 2008, to file a certificate of merit.

7 Accordingly, Defendant's motion to dismiss is premature at this time. However, the preservation
8 of Plaintiff's claim depends on the satisfaction of three conditions: (1) Plaintiff must pay her filing fee with
9 this Court;⁵ (2) Plaintiff must timely file a motion for a 90-day extension and must demonstrate to this
10 Court that good cause for granting the extension exists; and (3) Plaintiff must file a valid certificate of
11 merit⁶ by April 21, 2008. If any of the above conditions are not met by April 21, 2008, Plaintiff's
12 Complaint will be dismissed for failure to timely file the required certificate of merit.

13 For the above stated reasons, the Defendant's Motion to Dismiss [Dkt. # 6] is DENIED. Any
14 other pending Pretrial Deadlines are STAYED until April 22, 2008.

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16 IT IS SO ORDERED.

17 Dated this 27th day of March, 2008.

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20 
21 RONALD B. LEIGHTON
22 UNITED STATES DISTRICT JUDGE
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26 ⁴ The last day of the 45-day period after the commencement of the action not including Sunday or a
27 legal holiday was January 22, 2008. *See* Fed. R. Civ. P. 6(a).

28 ⁵ The district court may permit indigent litigants to proceed in forma pauperis upon completion of a
proper affidavit of indigence. *See* 28 U.S.C. § 1915(a).

⁶ The substantive requirements of such a certificate of merit are outlined in RCW 7.70.150.